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In the Supreme Court of the United States

OCTOBER TERM, 1937

STATES OF WISCONSIN, MINNESOTA, OHIO, PENNSYLVANIA, MICHIGAN, AND NEW YORK, COMPLAINANTS

v.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, ET AL.

ON APPLICATION OF THE STATES OF WISCONSIN, MINNESOTA, OHIO, PENNSYLVANIA, MICHIGAN AND NEW YORK, AND ON MOTION OF THE STATE OF NEW YORK, FOR MODIFICATION OF THE DECREE OF APRIL 21, 1930, OR IN THE ALTERNATIVE FOR REFERENCE TO A SPECIAL MASTER

MEMORANDUM ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

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Solicitor General,
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This memorandum is in response to an invitation from the Court, transmitted in a letter dated January 6, 1958, from the Clerk, to express the views of the Government with respect to the present application and motion in the above case.

In preparing this memorandum we have considered not only the moving papers and the brief in opposition, filed by the State of Illinois and the Metropolitan Sanitary District of Greater Chicago, but also

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the views of, and information provided by, the Department of State, the Department of Health, Education, and Welfare, and the Chief of Engineers of the United States Army. We have assumed that, in retaining jurisdiction over the case, 281 U. S. 698, the Court did not intend to limit further relief to the specific allegations as set forth in the original pleadings, but retained jurisdiction over the subject matter in controversy as it relates to diversions by the defendants of water from the Great Lakes into the Illinois-Mississippi waterway.

Although the United States has not been a party to these proceedings, there are federal interests which may be affected by variations in the quantity of waters diverted from the Great Lakes into the Mississippi. See *Sanitary District* v. *United States,* 266 U. S. 405. The federal power, and concomitant duty, with respect to navigable waters requires the Government to take all necessary steps to prevent any action which would impair navigability either on the Great Lakes, the St. Lawrence, the Illinois Waterway, or the Mississippi. As to the Great Lakes and the St. Lawrence River, the Government must also consider its international relations with Canada with respect not only to navigation but also hydro-electric development.

The present application and motion raise the issue of whether Illinois and its agency, The Metropolitan Sanitary District of Greater Chicago, should be required by amendment to the earlier decree to return to Lake Michigan the water which is now withdrawn

for domestic uses and discharged into the Sanitary and Ship Canal from which it flows into the Illinois River and eventually into the Mississippi River. The volume of water so withdrawn appears to have varied over the past 25 years between 1,600 c. f. s. and 1,805 c. f. s. This water withdrawn for domestic uses is in addition to the 1,500 c. f. s. which the Court permitted Illinois to withdraw in order to promote navigability in the Port of Chicago.

Considering the present motion and application in the light of the various federal interests:

1. The United States has no information which indicates that the total amount of water now being diverted, namely, the domestic pumpage of 1,600 c. f. s. to 1,805 c. f. s. plus the additional diversion of 1,500 c. f. s., is materially impairing navigability on the Great Lakes or the St. Lawrence River, or interfering with hydroelectric developments. The report of the Corps of Engineers completed in January, 1957, to which reference is made by both complainants and defendants herein, deals solely with the future results of a proposed additional diversion of 1,000 c. f. s. for an experimental period of three years; it is not directed to the effect of the present diversion. We are thus unable to advise the Court at the present time whether the current diversion is resulting in materially lowering the water level in the Great Lakes or the rate of flow therefrom so as to have any appreciable effect on navigation or otherwise.

2. With respect to the effect of the present diversion on the Illinois Waterway, some diversion is essential in order to maintain its navigability. Although a

considerable current is not essential to the operation of the system, there must be enough water available to operate the locks. The Chief of Engineers has informed us that it would require further study to determine whether the 1,500 c. f. s. now permitted, without the additional volume provided by the effluent from the Chicago sewage system, *i. e.*, the residue of the water taken from the Great Lakes for domestic uses, would be sufficent to operate the waterway.

3. At the present time, diversion of water from the Great Lakes is not essential to the maintenance of sufficient depth of water at the Alton Lock on the Mississippi to handle the present traffic. This is the area where low water last winter caused the emergency resulting in the temporary increase of diversion permitted by this Court. 352 U. S. 945, 983. Although the emergency situation may recur before permanent remedial steps are taken, the Chief of Engineers has recommended to Congress a plan to avoid a repetition of the emergency without increasing the diversion.

4. Insofar as the sanitary problem arising from the deposit of sewage in the Sanitary and Ship Canal is involved, we have no information that at present there exists a condition endangering health. Essentially, as this Court pointed out in *Wisconsin* v. *Illinois,* 281 U. S. 179, if such a condition exists, it is a problem for Illinois to solve and a problem which Illinois must solve independently of diversions designed to promote navigation.

5. The United States is unable to form any judgment as to the effect on future diversion of the pros-

pective growth in population and industry in the Chicago area. From the figures appearing in Appendix E, page 43 of the Defendants' Opposition, it does not appear that there has been any material increase in the amount of domestic pumpage during the past 25 years although there has been a material increase in population and industrial activity.

In sum, on the basis of the facts related in the moving papers and the information otherwise now available to the Government, we are not able to determine that the present diversion for domestic pumpage, in addition to the 1,500 c. f. s. permitted under the order of this Court, is impairing navigation or materially hindering hydro-electric development by reducing the level of the Great Lakes or decreasing the volume of outflow therefrom. However, a belief that there is a present injury and an apprehension of increasing injury appear to be the basis for the application and the motion. We do not believe that either a present or future injury is alleged with sufficient specificity to justify the relief requested. Nevertheless, if there is basis for the complaint, interests of grave importance to the States, the United States, and Canada are involved. The United States believes, therefore, that in order to reach a determination as to whether the matter should be reopened and referred to a special master the complainant States should be given the opportunity to make more definite and certain the allegations contained in their application and motion. On the basis of such specific allegations of fact it may be possible to determine whether some present

relief is justified or whether further testimony is necessary for a disposition of the motion and application.

Respectfully submitted.

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Attorney.

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